STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 9, 2008
v	No. 278115 Washtenaw Circuit Court
MAURICE OAKLEY CLAY, Defendant-Appellant.	LC No. 05-002085-FH

Before: Donofrio, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree criminal sexual conduct (CSC), MCL 750.520b(e) and (f), kidnapping, MCL 750.349, and assault with intent to rob while armed, MCL 750.89. Because defendant has failed to establish plain error based on the delay before his arrest; the trial court did not abuse its discretion when instructing the jury; defendant was not denied the effective assistance of counsel at trial or on appeal; and, defendant has not shown that exculpatory evidence existed and was withheld from the defense, we affirm.

I. Background

Defendant's convictions arise from an assault on December 27, 1989. The victim testified that she left work at the Briarwood Mall in Ann Arbor at approximately 9:00 p.m. As she was getting into her car, a man approached her and struck her on the head with a tire iron. The man then threw her into the passenger seat of the car, pulled her coat over her head, shoved her down in the seat, and drove to a secluded office complex parking lot. As he drove, the victim tried to look up, but the man kept pushing her head down below the window.

When they arrived at the parking lot, the man demanded money and became angry when he discovered that the victim did not have any. The man then sexually assaulted the victim while armed with a knife. Afterward, he instructed the victim to drive back to the mall parking lot. While en route, he threw the victim's purse and wallet out the car window. The police later recovered the items. After arriving back at the mall, the victim was able to escape from the car after punching the man. Other employees were leaving for the night and the victim was taken to a hospital by two coworkers. They testified that the victim's clothes were in disarray, her nylons had been ripped, and she was bleeding from her head. The victim's assailant was able to escape.

The victim was examined at the hospital and samples for a rape kit were collected. Non-motile sperm were noted on a vaginal smear slide. Lynne Helton, a prosecution witness, testified that the number of sperm indicated that the seminal fluid had been deposited no more than six hours before it was collected. The victim had a laceration above her right eyebrow and a broken left thumb. Her clothes were taken into evidence. Physical evidence was also collected from the victim's car. A latent print was found on a small knife, but it was of insufficient quality for comparison purposes when analyzed in early 1990. No other prints were found. None of the other evidence contained anything of evidentiary value.

The case remained unsolved until 2004, when defendant's DNA profile in a national database matched the profile developed from the semen taken from the victim. However, most of the physical evidence from the case was destroyed in 1996, because of a misunderstanding regarding the applicable statute of limitations. The samples from the rape kit were retained because they were stored at the state crime lab, not the Ann Arbor Police Department. No witnesses were able to identify defendant as the assailant. The DNA match was the only evidence to connect defendant to the offense. Defendant testified that he had consensual sex with the victim on the night before the charged incident, which the victim denied.

II. Appellate Counsel's Issues on Appeal.

A. Prearrest Delay

Defendant argues that his right to due process was violated by the delay between the offense in 1989, and his arrest in 2005. Because defendant did not preserve this issue by raising it below, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). To a limited extent, procedural due process guarantees protect a defendant against delay between the commission of an offense and arrest or indictment for that offense. *United States v Lovasco*, 431 US 783, 798; 97 S Ct 2044; 52 L Ed 2d 752 (1977); *People v Cain*, 238 Mich App 95, 109; 605 NW2d 28 (1999). To merit reversal of a defendant's conviction, a prearrest delay must have resulted in actual and substantial prejudice to the defendant's right to a fair trial and the prosecution must have intended a tactical advantage. *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000). To be substantial, the prejudice to the defendant must have meaningfully impaired his ability to defend against the charges such that the outcome of the proceedings was likely affected. *Id*. Actual prejudice is not established by general allegations or speculative claims of faded memories, missing witnesses, or other lost evidence. *Cain, supra* at 109-110.

Defendant argues that he was prejudiced because the delay resulted in the destruction of evidence, namely, photographs of the victim's car, physical evidence, and the rape kit, the testing of which may have revealed exculpatory evidence. With regard to the rape kit, defendant cannot establish prejudice because the samples from the kit were preserved at the crime lab. They were not destroyed. Regarding the other evidence, other than the latent print on the knife, no latent prints or foreign materials were found on the destroyed evidence. Defendant's assertion that the destruction of this evidence was prejudicial because advanced technology might have led to the discovery of DNA or fingerprints from another individual is based on mere speculation, which is insufficient to establish a due process violation. *People v Adams*, 232 Mich App 128, 137-138; 591 NW2d 44 (1998). Defendant also fails to explain how his defense was prejudiced. His theory of defense was that he engaged in consensual sex with the victim on the night before her

assault, and that there was no evidence connecting him to the victim's car on the night of the assault. None of the destroyed evidence was relevant to defendant's claim that he engaged in consensual sex with the victim. Moreover, without the destroyed evidence, defendant's argument regarding the lack of evidence connecting him to the victim's car was stronger. Defendant has not established plain error.

B. Kidnapping Jury Instruction

Defendant next argues that the trial court erred by instructing the jury on kidnapping by secret confinement in accordance with CJI2d 19.4, rather than kidnapping by forcible confinement or imprisonment pursuant to CJI2d 19.1. Jury instructions that involve questions of law are reviewed de novo, but the determination whether an instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

The kidnapping charge alleged that defendant "did willfully, maliciously and without lawful authority forcibly or secretly confine or imprison" the victim. But an instruction not supported by the evidence should not be given. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). To be guilty of kidnapping by secret confinement, a defendant must have (1) willfully, maliciously, or without legal authority, (2) secretly confined or imprisoned another person, (3) by force or without consent. *People v Jaffray*, 445 Mich 287, 305; 519 NW2d 108 (1994). The essence of secret confinement is "the deprivation of the assistance of others by virtue of the victim's inability to communicate his predicament." *Id*. at 309. It is sufficient that the "secrecy, or attempt to maintain secrecy, denied the victim the opportunity to avail himself of outside help." *Id*. at 307.

In this case, the evidence showed that defendant hit the victim on the head with a tire iron, threw her into the passenger seat of her car, shoved her head down, pulled her coat over her head, and drove to a secluded location. As defendant drove, he continually shoved the victim's head down below the window as she tried to raise it up. The victim testified that she was never able to look directly out the car window during the drive to the parking lot. These facts support the jury instruction on kidnapping by secret confinement. Defendant's conduct could reasonably be interpreted as an effort to prohibit the victim from seeing out the window or being seen by others.

Defendant asserts that CJI2d 19.1 should have been given because there was ample evidence of asportation. Asportation is necessary to kidnapping through forcible confinement or imprisonment, but not to secret confinement or forcible confinement with intent to secretly confine the victim. *Jaffray, supra* at 298-299. Secret confinement is an alternative theory of kidnapping. *People v Watkins*, 209 Mich App 1, 4-5; 530 NW2d 111 (1995). The prosecutor was free to pursue whichever theory the evidence supported, even if it supported multiple theories. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988). Thus, regardless of whether the evidence would have supported an instruction on an additional theory of kidnapping by forcible confinement or imprisonment in accordance with CJI2d 19.1, because the evidence supported an instruction on kidnapping by secret confinement, the trial court did not abuse its discretion in giving CJI2d 19.4.

III. Defendant's Standard 4 Brief

Defendant raises additional issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-4, Standard 4.

A. Effective Assistance of Counsel

Defendant argues that trial counsel was ineffective. Because defendant failed to raise this issue in a motion for a new trial or request for an evidentiary hearing, our review is limited to mistakes apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must show that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the result of the proceedings would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).

Defendant's numerous claims essentially take issue with defense counsel's failure to present certain evidence. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). A substantial defense is one that might have made a difference in the outcome of the trial. *Id*.

Defense counsel chose not to contest that the victim was attacked. Considering the defense theory that defendant engaged in consensual intercourse with the victim on the night before the assault, thereby explaining the DNA match, and that there was no other evidence connecting defendant to the charged offense, together with the strength of the evidence showing that someone had assaulted the victim and attempted to rob her, this strategy was not unreasonable. That a strategy does not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant asserts that defense counsel could have done more to establish that his DNA was not deposited in the victim at the time of the assault. Defendant contends that defense counsel should have hired an independent DNA expert. However, Helton testified that the smears were not retained after she examined them.[1] Thus, another expert could not have counted the sperm present and defendant offers nothing to suggest that Helton's conclusion, that the amount of sperm present suggested that it was deposited no more than six hours before it was

[1] This was not part of the evidence destruction in 1996, and there is no suggestion that their destruction was anything other than routine.

collected, was erroneous. Moreover, the medical testimony that was presented did not contradict Helton's conclusion and defendant fails to identify any medical evidence to support his claim that the sperm could not have been deposited on the night of the assault. Additionally, defendant has mischaracterized the examining nurse's testimony. She specifically stated that she could not estimate when the sperm was deposited.

With regard to the victim's coat, defendant presents nothing to suggest that its return to the victim a few days after the assault constituted evidence tampering or was improper. There is no indication that the coat had any evidentiary value. Moreover, defense counsel used the lack of physical evidence connecting defendant to the victim's car to defendant's advantage. This strategy was not unsound. Declining to raise objections to procedures, evidence, or argument can be sound trial strategy. *People v Unger (On Remand)*, 278 Mich App 210, 242, 253; 749 NW2d 272 (2008), lv pending Accordingly, we conclude that defendant was not denied the effective assistance of trial counsel.

B. *Brady*[2] Violation

Defendant argues that his due process rights were violated because Helton fabricated her testimony regarding the sperm count and its significance in order to shore up the prosecution's case. He contends that the prosecution withheld the actual test results that proved the sperm was not deposited on the night the charged offenses occurred. Defendant did not raise this issue in the trial court and, therefore, the issue is not preserved. Accordingly, defendant must establish a plain error affecting his substantial rights. *Carines*, *supra* at 763-764.

> In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).]

In this case, defendant has failed to substantiate his claim that different test results existed, let alone were exculpatory and purposefully withheld from the defense. Because there is no evidence that Helton fabricated her testimony, defendant has not established a plain error.

C. Effective Assistance of Appellate Counsel

Defendant argues that appellate counsel was ineffective for failing to raise the ineffective assistance of counsel and *Brady* violation claims raised in defendant's Standard 4 brief. The test for ineffective assistance of appellate counsel is the same as that for an ineffective assistance of trial counsel claim. Defendant must show that counsel's performance was deficient under an objective standard of reasonableness and that the deficiency prejudiced the defendant. *People v Uphaus (On Remand)*, 278 Mich App 174, 186; 748 NW2d 899 (2008), lv pending. Having

[2] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

found no merit to defendant's pro se issues, we conclude that appellate counsel was not ineffective for failing to raise them. Appellate counsel is not required to raise meritless issues on appeal. *People v Reed*, 449 Mich 375, 402; 535 NW2d 496 (1995) (Boyle, J.).

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald